Nos. 139 and 140

In the Supreme Court of the United States

October Term, 1944

Harvey Gilmore Nicholson, Petitioner

v.

United States of America

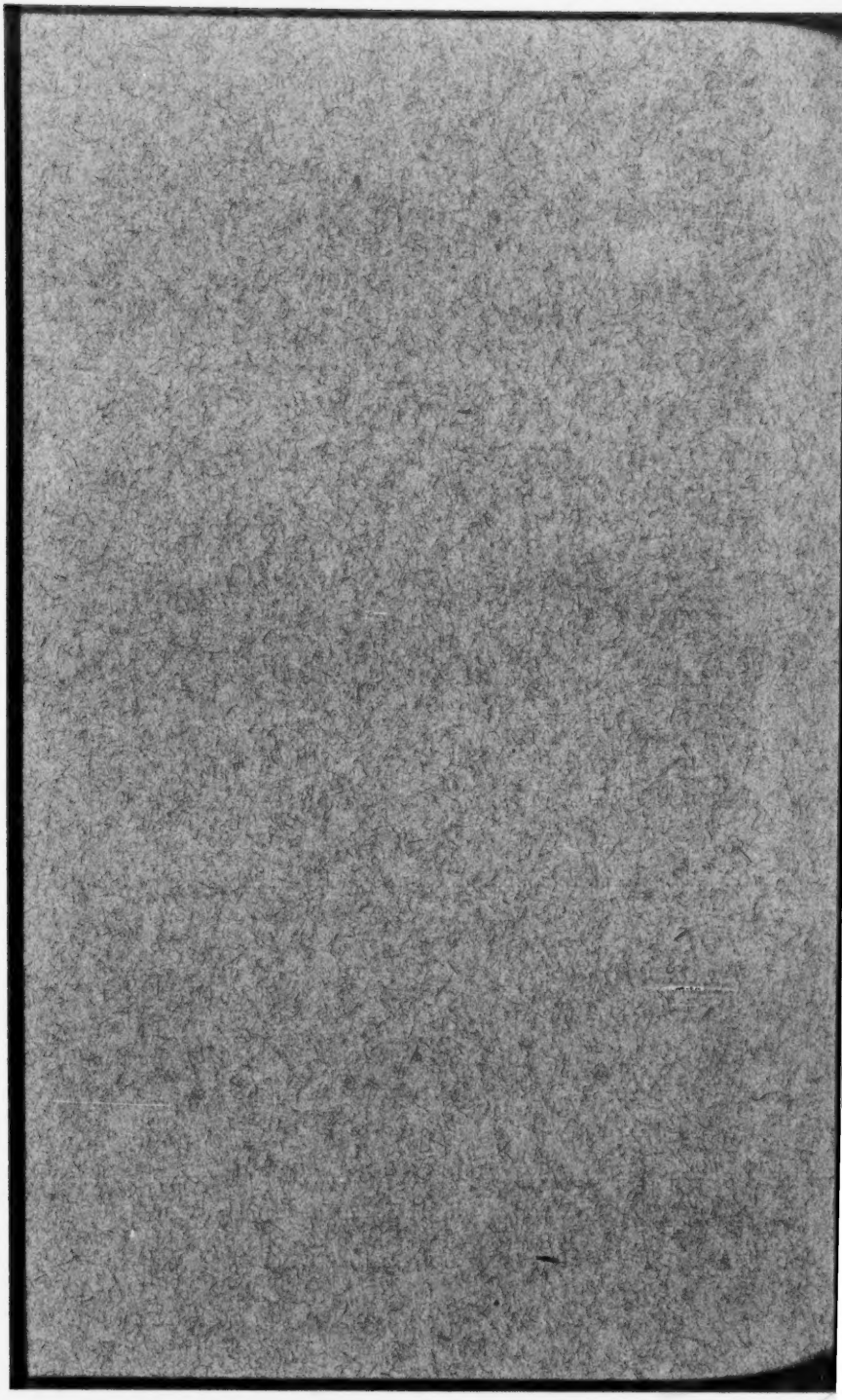
Albert Clifford Lowery, Petitioner

v.

United States of America

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES [illegible]



In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 139

HARVEY GILMORE NICHOLSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 140

ALBERT CLANTON LOWERY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On July 10, 1943, petitioners were separately indicted in the United States District Court for the Southern District of Florida for violation of the Selective Training and Service Act of 1940, 54 Stat. 885 (50 U. S. C. 301 et seq.). Nicholson was charged with having wilfully failed and

599703—44

neglected to report to his local board for work of national importance under civilian direction as required by the order of his local board (No. 139, R. 1–4). Lowery was charged with having failed to comply fully with the order of his local board to report for work of national importance in that, although he reported to the local board, he refused to perform work of national importance (No. 140, R. 1–5).[1]

At petitioners' separate jury trials the Government proved that they had registered with their local boards and filed the regular questionnaires (No. 139, R. 24–26, 85–106; No. 140, R. 32–33, 34, 97, 140–164) and also conscientious objector forms (No. 139, R. 28–29, 110–119; No. 140, R. 33–34, 104, 122, 164–175); that they were classified I–A–O (available for noncombatant military service) by their local boards and upon appeal to the appeal boards were classified IV–E (conscientious objectors to both combatant and noncombatant military service) (No. 139, R. 27, 36–37,

[1] This charge is based on evidence which discloses that although Lowery reported to the local board and was furnished transportation to a conscientious objector camp, he refused to proceed to the camp assigned (No. 140, R. 42–43, 53–54, 123, 128). It is clear from the order to report set forth in the indictment (R. 4) and Selective Service Regulation 652.11 that Lowery's duty under the Act and Regulations did not end with his mere reporting to the local board; that he also had a duty to report to the camp to which he had been assigned by the Director of Selective Service and to perform work of national importance under civilian direction at that camp.

109, 123; No. 140, R. 35–36, 46, 47, 72, 104–106, 120); that each was notified of his classification and thereafter ordered to report for work of national importance (No. 139, R. 27–30, 120–122; No. 140, R. 39–40, 181–185, 208); and that petitioners each received these notices and orders (No. 139, R. 70–71; No. 140, R. 42–43, 107, 120, 206), but wilfully failed and refused to comply with the orders (No. 139, R. 30, 40, 58, 124; No. 140, R. 40, 42–43, 76–77, 107–108, 121, 123, 127–128, 206–207).

The trial court excluded evidence offered by petitioners to show that they were ministers of religion and therefore entitled to exemption from training and service under the Act (No. 139, R. 48, 52–61, 63, 66, 68, 69, 74–75, 82, 128–134, 155–159, 161–162; No. 140, R. 31, 78–97, 101, 109–119, 126–127, 190–192, 194, 197–205, 208).[2] The court also specifically instructed the jury in each case that it was not their function to pass upon the correctness of the draft board's classification of petitioner, but merely to determine whether petitioner had received the board's order to report and had refused to obey the order (No. 139, R. 78–80; No. 140, R. 134–136).

Petitioners were each convicted and sentenced to imprisonment for three years (No. 139, R. 13,

[2] Prior to the trial petitioners unsuccessfully attacked the indictments by demurrers, motions to quash and pleas in abatement based primarily on the ground that they were unlawfully denied exemption as ministers, and that the local boards' orders to report were therefore void (No. 139, R. 4–13; No. 140, R. 5–6, 8–17; see also R. 108, 121, 206–207).

163–164; No. 140, R. 18, 208–209). Upon appeals, which were disposed of in a single opinion, the convictions were affirmed *per curiam* by the Circuit Court of Appeals for the Fifth Circuit (No. 139, R. 180–181; No. 140, R. 225–226).

Here, as in *Falbo* v. *United States,* 320 U. S. 549,[3] petitioners sought to defend their refusal to report for service on the ground that the orders to report were void in that they were based upon an erroneous classification. The decision of this Court in the *Falbo* case, rejecting such a contention as incompatible with the structure, history, and purposes of the Selective Training and Service Act of 1940, makes it unnecessary to reargue the question here. Petitioners' characterization of the local board's actions as "arbitrary and capricious" does not raise any additional constitutional questions. Petitioners complain only of the boards' refusal, upon the facts presented to them, to classify petitioners as ministers entitled to exemption under the Act.

Since the exemption from military service is a matter of legislative discretion rather than constitutional mandate (*United States* v. *Macintosh,* 283 U. S. 605, 622; *Hamilton* v. *Regents,* 293 U. S.

[3] The Selective Service Regulations in effect at the time of petitioners' offenses were identical with those applicable in the *Falbo* case. Here, as in that case, the administrative process of selection had not been completed at the time of the offenses in question (see p. 553 of the *Falbo* decision).

245, 263–264; *Rase* v. *United States*, 129 F. (2d) 204, 210 (C. C. A. 6)), petitioners' contention (No. 139, Pet. 8–9; No. 140, Pet. 8–9) that the First Amendment forbids delegation of the fact-finding function to the Selective Service boards with reference to a registrant's ministerial status plainly is without merit.

It is respectfully submitted that the petitions for writs of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

TOM C. CLARK,
Assistant Attorney General.

WILLIAM STRONG,
Special Assistant to the Attorney General.

IRVING S. SHAPIRO,
Attorney.

JULY 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944